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No. 883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STEELWORKERS OF AMERICA, *Petitioner*

v.

GALLAND-HENNING MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on February 4, 1957.

OPINIONS BELOW

The opinion of the District Court (R. 44) is reported at 139 F. Supp. 630. The opinion of the Court of Appeals, which is reprinted in Appendix B hereto, pp. 13-22, is reported in 39 LRRM 2384.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a Federal District Court has authority, in a suit brought by a union under Section 301(a) of the

Labor-Management Relations Act, 1947, to compel compliance by an employer with his contract to arbitrate disputes arising under a collective agreement with the union.

2. Whether a Federal District Court has authority to grant such relief where, under the substantive law of the applicable state, the agreement to arbitrate is valid and enforceable.

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. 185, 61 Stat. 156, provides, in pertinent part, as follows:

> Section 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The pertinent provisions of the Wisconsin Employment Peace Act and the Wisconsin General Arbitration Act are set forth in Appendix A.

STATEMENT

The petitioner, United Steelworkers of America (hereinafter referred to as the Union) is a labor organization representing the employees of the respondent Galland-Henning Manufacturing Company (hereinafter referred to as the Company). The Company operates a plant in Milwaukee, Wisconsin. It is engaged in an industry affecting commerce and is subject to the Labor-Management Relations Act, 1947. (R. 37).

In June 1953, the parties entered into a collective bargaining agreement. This agreement covered wages, hours, and other conditions of employment. It contained a no-strike clause (R. 15-16). In addition, it established a five-

step procedure for the settlement of grievances (R. 12-13). The fifth step of this procedure was arbitration.

The agreement provided that if a grievance was not settled in the first four steps of the grievance procedure it should then be submitted to an arbitrator "upon the written request of either party." (R. 12). The arbitrator was to be chosen by joint agreement between the Company and the Union, with a proviso that if agreement could not be reached within fifteen working days he should be appointed by the Director of the United States Conciliation Service. The arbitrator's function was limited to the interpretation and application of the collective agreement and it was agreed that his decisions should be final. (R. 13).

Shortly after the 1953 agreement was signed, a number of grievances arose as to the interpretation and application of the agreement. These grievances were processed through the first four steps of the grievance procedure and were all denied by the Company. Thereupon, in accordance with the procedure prescribed in the agreement, the Union, on various dates between August 24 and November 16, 1953, informed the Company in writing that it desired to arbitrate these grievances. The Company refused to arbitrate any of the grievances. (R. 39-41).

The grievances as to which arbitration was refused covered a variety of subjects. One involved disagreement between the Company and the Union as to the proper method of application of the wage increase provided for in the agreement of July 11, 1953. That agreement provided in Article XI, Section 1(b), that there should be a flat wage increase of 10c per hour for all employees engaged in work under the Company's wage incentive plan and a flat increase of 15c per hour for all employees "while not engaged in work under said incentive plan." The disagreement concerned the wage increase payable to employees who actually performed non-incentive work, even though they were normally incentive employees. (R. 39).

Other grievances involved deductions made by the Company from incentive pay and the question of whether a non-incentive employee who was assigned to perform incentive work was entitled to incentive wages for that work. (R. 39-40).

The last of the grievances involved the right of the Union to invoke the special provisions in the seniority article of the agreement in the case of a layoff of a union officer because his machine had broken down. Article IV, Section 1(c), provided that if it became necessary to lay off an officer or any member of the grievance committee of the Union the case would be discussed with the Union prior to the layoff. One Robert Krenz, an officer of the Union, was laid off when his machine broke down. The Company did not discuss the case with the Union prior to laying Krenz off, and took the position that the requirement that it discuss the case with the Union applied only to a layoff for lack of work and did not apply to a layoff because of a machine breakdown. (R. 40-41).

After the Company refused to arbitrate these grievances the Union filed a complaint in the United States District Court for the Eastern District of Wisconsin, alleging jurisdiction under Section 301(a) of the Labor-Management Relations Act, 1947, and praying for specific performance of the agreement to arbitrate. (R. 2-4). It also filed a petition under the United States Arbitration Act praying for the issuance of an order directing the Company to arbitrate the controversies in accordance with the provisions of the collective agreement. (R. 27-28).

The complaint and petition as originally filed did not set forth the nature of the grievances involved and, on September 30, 1954, the District Court granted a motion to make more definite and certain. (R. 30). Thereupon, the Union filed an amended complaint (R. 37-42) and an amended petition under the Arbitration Act (R. 42). The Company moved to dismiss for want of jurisdiction (R. 43).

The District Court granted the motion, holding that the Norris-LaGuardia "constitutes an insuperable bar to the granting of the relief sought." (R. 48).

The Court of Appeals for the Seventh Circuit affirmed the dismissal but on wholly different grounds. In an opinion by Judge Major it first held that the Norris-LaGuardia Act was *not* a bar. It then proceeded to consider Section 301(a) of the Labor-Management Relations Act and concluded that it was procedural only and created no federal substantive rights. The Court then considered whether, in the Arbitration Act, Congress had created a federal substantive right to enforce an arbitration clause in a collective agreement. It concluded that while "a mere bargaining agreement" would not constitute a contract of employment, an agreement which specifies in detail the rights and obligations "of the parties, including the employees" was a contract of employment and hence was excluded from the Arbitration Act by the exemption in Section 1. And, in any case, it concluded, a collective agreement, however categorized, does not "evidence a transaction" so as to be within the coverage of Section 2. Judge Finnegan concurred in the result.

The Court of Appeals made no reference to state law, presumably on the assumption that only federal substantive rights could be enforced in a Section 301(a) action.

REASONS FOR GRANTING THE WRIT

1. This case presents the same basic question that is now before the Court in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, No. 211; *Goodall-Sanford, Inc.* v. *United Textile Workers*, No. 262; and *General Electric Co.* v. *Electrical Workers*, No. 276.

This case, however, is not identical with those cases. At least the following differences exist:

(a) One of the underlying grievances here involves a claim that the Company has breached a duty ex-

plicitly owed under the collective agreement to the Union as such—the obligation to consult with the Union before laying off a Union officer.

(b) The Union here specifically invoked the provisions of the United States Arbitration Act in the District Court.

(c) Under the applicable state substantive law, the agreement to arbitrate is a valid and enforceable contract.

2. The decision below is in conflict with decisions of the First, Second, Third, Fifth, and Sixth Circuits. The First,[1] Second,[2] Third,[3] and Sixth[4] have held, contrary to the court below, that the United States Arbitration Act is applicable, on one ground or another, in suits for violation of collective agreements, covering other than transportation workers, brought under Section 301(a) of the Labor-Management Relations Act, 1947. The Fifth Circuit has held, to the contrary, that the Arbitration Act is inapplicable and that, in a suit brought under Section 301(a), resort must be had to state law to determine the enforceability of arbitration provisions in collective agreements.[5] In holding that such enforcement cannot be had in a Section 301(a) suit, without reference to state law, the court below is in clear conflict with the rationale of the Fifth Circuit.

A word of explanation as to the state law involved here is perhaps necessary. The collective agreement here was made in Wisconsin and was to be performed in Wisconsin.

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[1] *Local 205* v. *General Electric Co.*, 233 F. 2d 85 (1st Cir. 1956), No. 276 this term.

[2] *Signal-Stat Corp.* v. *Local 475*, 235 F. 2d 806 (2d Cir. 1956), now pending in this Court on petition for certiorari as No. 520.

[3] *Tenney Engineering, Inc.* v. *United Electrical Workers*, 207 F. 2d 450 (3d Cir. 1953).

[4] *Local 19, Warehouse Workers Union* v. *Buckeye Cotton Oil Co.*, 236 F. 2d 776 (6th Cir. 1956).

[5] *Textile Workers* v. *Lincoln Mills of Alabama*, 230 F. 2d 81 (5th Cir. 1956), No. 211 this Term.

If state law is relevant in determining whether the remedy of specific enforcement is available in a Federal District Court in a Section 301(a) action, the relevant law is, therefore, the law of Wisconsin.

It is clear that an executory agreement to arbitrate contained in a collective agreement is *substantively* valid and enforceable in Wisconsin. The procedure by which the substantive right created by such an agreement is enforced, however, requires some description.

The Wisconsin statutes, in Chapter 298, provide a procedure for the specific enforcement of agreements to arbitrate in very much the same manner as does the United States Arbitration Act. It contains, however, the following limitation:

> ". . . . provided, however, that the provisions of this chapter shall not apply to contracts between employers and employees, *or between employers and associations of employees,* except as provided in Section 111.10 of the statutes." (Wis. Stat. § 298.01 (1955) emphasis added).

Section 111.10, thus referred to, provides that parties to a labor dispute may agree in writing to have the Wisconsin Employment Relations Board arbitrate the dispute, in which case arbitration proceedings would be had as provided in Chapter 298.

The question of the effect of these combined provisions upon agreements to arbitrate future grievances under a collective agreement was first considered by the Wisconsin Supreme Court in *Local 1111* v. *Allen-Bradley Co.*, 259 Wis. 609, 49 N.W. 2d 720 (1951). In that case it was held that the exception to Chapter 298 constituted an expression of the legislature that the common-law rule that agreements for arbitration were not specifically enforceable should be continued with respect to collective agreements. (Section 111.10 was obviously inapplicable to general grievance arbitration provisions.) The court was not called

upon to decide, and did not decide, whether the common-law rule of non-enforceability was a rule of substance or simply a limitation on the equity powers of the Wisconsin courts.

In June 1954, in *Dunphy Boat Corp.* v. *Wisconsin Employment Relations Board,* 267 Wis. 316, 64 N.W. 2d 866 the Wisconsin Supreme Court made clear its view that the limitation was a procedural one only. That case involved another portion of the Wisconsin statutes: Section 6(1)(f) of the Wisconsin Employment Peace Act (Wis. Stat. § 111.06 (1)(f) (1955)). This provision makes it an unfair labor practice for an employer "to violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award)." In the *Dunphy* case, the Wisconsin Board found that the employer had refused to perform an agreement to arbitrate grievances and it issued an order directing the employer to proceed with arbitration in accordance with its agreement. The power of the Board to issue such an order came before the Wisconsin Supreme Court. The employer contended that executory agreements to arbitrate were substantively unenforceable under the Court's prior decision in the *Allen-Bradley* case and that, therefore, the Wisconsin Employment Relations Board had no authority to direct compliance with the terms of such an agreement, although it could adjudicate the contract issue on the merits. It was agreed that the parenthetical phrase relating to an agreement to accept an arbitration award was not applicable. The question, therefore, was whether the agreement to arbitrate was one of the enforceable "terms of a collective bargaining agreement."

The Wisconsin Supreme Court held that it was and enforced the order of the Wisconsin Board. In so doing it said (emphasis in original):

> ". . . . there is nothing illegal or against public policy in a contract provision requiring the parties to arbitrate a future dispute. At common law such an

agreement was not illegal but merely not specifically enforcible. On this point see authorities cited at page 614 of our decision in *Local 1111* v. *Allen-Bradley Co.* (1951), 259 Wis. 609, 49 N.W. 2d 720.

". . . . Our holding in the Allen-Bradley Case was based upon the premise that courts were powerless at common law to enforce an agreement to arbitrate a future dispute, and therefore, without statutory authority conferring such power on the courts, they could not grant specific performance of such a contract. Ch. 298, Stats., was the only statute which attempted to invest the courts of this state with power to specifically enforce an agreement to arbitrate future disputes, but sec. 298.01 thereof specifically excluded labor contracts from the provisions of that chapter. *However, sec. 298.01 does not declare that arbitration clauses in labor contracts are not specifically enforcible,* but merely states that the provisions of ch. 298 shall not apply to collective bargaining contracts between employer and employee, except as provided in sec. 111.10. There is, therefore, no necessity to resort to ch. 298 in order to construe ch. 111 with respect to the powers conferred by the latter chapter upon W.E.R.B.

"There is nothing to prevent the legislature from conferring powers of a quasi-judicial nature upon administrative agencies with which it does not invest the courts." 267 Wis. at 322, 325, 64 N.W. 2d at 869-870, 871.

As thus illuminated by the Supreme Court of Wisconsin, it is clear that the *substantive* law of Wisconsin is that a promise to arbitrate future grievances, contained in a collective agreement, is as valid and irrevocable as any other obligation in such an agreement. By statute, however, the special judicial procedure which the legislature has established in Ch. 298 for arbitration provisions in commercial agreements is not available for collective agreements. But this limitation does not amount to a declaration "that

arbitration clauses in labor contracts are not specifically enforceable." To the contrary, the promise to arbitrate is enforceable, like any other term of a collective agreement, but, procedurally, the first step must be initiated before the Employee Relations Board, rather than a *nisi prius* court, subject to judicial review and enforcement.

3. Since Nos. 211, 262 and 276 have already been argued before the Court, we do not urge that certiorari now be granted in this case but respectfully suggest that the petition be "held" and disposed of in accordance with the decisions in those cases.

Specifically, we suggest that if this Court agrees with the First, Second, Third and Sixth Circuits that the remedy of specific performance is available in a Section 301(a) action irrespective of state law, the petition herein be granted, the judgment of the Court of Appeals reversed, and the cause remanded. If the Court should hold that the availability of specific performance in a Section 301(a) action is dependent upon the substantive law of the state, as the Fifth Circuit has indicated, we suggest that the petition herein be granted and the cause remanded specifically for determination as to whether agreements to arbitrate grievances under labor contracts are substantively valid and irrevocable under the law of Wisconsin. Finally, of course, if this Court should decide that specific performance is not available in a Section 301(a) action whatever the state law and whatever the nature of the underlying grievances—as the court below apparently held—the petition should be denied.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

The Wisconsin Arbitration Act, 1951 (Wisc. Stat. §§298.01-298.15 (1955)) provides in pertinent part as follows:

Sec. 298.01 **Arbitration Clauses in Contracts Enforcible.** A provision in any written contract to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable and enforcible save upon such grounds as exist at law or in equity for the revocation of any contract; provided, however, that the provisions of this chapter shall not apply to contracts between employers and employees, or between employers and associations of employees, except as provided in section 111.10 of the statutes.

* * * * *

Sec. 298.03 **Court Order to Arbitrate, Procedure.** The party aggrieved by the alleged failure, neglect or refusal of another to perform under a written agreement for arbitration, may petition any court of record having jurisdiction of the parties or of the property for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of a summons. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the

trial thereof. If no jury trial be demanded the court shall hear and determine such issue. Where such an issue is raised, either party may, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury called and impaneled in the manner provided for the trial of equity actions. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

The Wisconsin Employment Peace Act, approved May 2, 1939, effective May 5, 1939, as last amended in 1951, (Wis. Stat. §§ 111.01-111.17 (1955)) provides, in pertinent part, as follows:

111.06 **What Are Unfair Labor Practices.** (1) It shall be an unfair labor practice for an employer individually or in concert with others:

. . . . (f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

* * * * *

111.10 **Arbitration.** Parties to a labor dispute may agree in writing to have the board act or name arbitrators in all or any part of such dispute, and thereupon the board shall have the power so to act. The board shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in any such arbitration shall be as provided in chapter 298 of the statutes.

APPENDIX B

In the United States Court of Appeals for the Seventh Circuit

No. 11774 SEPTEMBER TERM, 1956, JANUARY SESSION, 1957

UNITED STEELWORKERS OF AMERICA, C. I. O., and WALTER BURKE,
Plaintiffs-Appellants,
v.
GALLAND-HENNING MANUFACTURING COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

February 4, 1957.

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is an appeal from an order of the district court entered March 12, 1956, dismissing a complaint for failure to state any claim upon which relief could be granted. The parties in this court agree, as they did in the court below, that only questions of law are involved, thereby obviating any necessity for a detailed statement of facts.

Plaintiff union is a labor organization, recognized as the sole collective bargaining agent of production and maintenance employees at defendant's plant located in Milwaukee, Wisconsin, and, as such, entered into a collective

bargaining agreement with defendant on July 11, 1953, which provided for a grievance procedure to resolve disputes, including a provision for arbitration. In view of the posture of the case as it comes to this court, we see no point in setting forth the various steps provided as a prelude to the right of the parties to call for arbitration.

It is sufficient to note that the arbitration provision is in the conventional form found in labor contracts and that the defendant, upon demand of the union, refused to submit certain grievances in dispute to arbitration.

Plaintiffs by their complaint sought a decree requiring specific performance by defandant of the arbitration provision. The alleged right to such relief was predicated upon Section 301 of the Labor Management Relations Act, 29 U.S.C.A. Sec. 185 (a), and the Federal Arbitration Act, 9 U.S.C.A. Secs. 1-15. Defendant moved to dismiss the complaint on the ground that the court was without jurisdiction of the subject matter. The court rendered an opinion and concluded that the Norris-LaGuardia Anti-Injunction Act, 29 U.S.C.A. Secs. 101-115, constituted "an insuperable bar to the granting of the relief sought." United Steelworkers of America, C.I.O. and Walter Burke v. Galland-Henning Mfg. Co., 139 F.Supp. 630. Thereupon, the court entered the order from which this appeal comes.

Notwithstanding that the complaint was dismissed upon the sole ground stated, other propositions of law are relied upon in support of the dismissal, which we conclude should be decided. The contested issues stated by plaintiffs and as agreed to by defandant are:

> "1. Does the Norris-LaGuardia Anti-Injunction Act, 29 U.S.C. Sections 110-115, prohibit a federal court from enforcing the arbitration clause set forth in a collective bargaining agreement?
>
> 2. Does Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, require a federal

district court to specifically enforce the arbitration clause of a collective bargaining agreement?

3. Does the Federal Arbitration Act, 9 U.S.C. Sections 1-15, either of its own force or in conjunction with Section 301 of the Labor Management Relations Act, require a federal district court to enforce the arbitration clause of a collective bargaining agreement?"

That the issues thus presented involve difficult problems is evidenced by the fact that they have been considered by many courts, with much contrariety of view both as to result and reasoning. There has already been so much written on these issues that we shall state the reasons for our decision without attempting to discuss the many cases called to our attention. Also to be noted is the fact, so we are advised, that the Supreme Court has allowed certiorari in *Local 205, United Electrical, Radio and Machine Workers of America (UE)* v. *General Electric Company,* 233 F.2d 85 (CA-1, 1956); *Goodall-Sanford, Inc.* v. *United Textile Workers of America, AFL, Local 1802 et al.,* 233 F.2d 104 (CA-1, 1956); *Lincoln Mills of Alabama* v. *Textile Workers Union of America, CIO,* 230 F.2d 81 (CA-5, 1956); *Signal-Stat Corp.* v. *Local 475, United Electrical, Radio and Machine Workers of America (UE),* 235 F.2d 298 (CA-2, 1956), and *Local 19, Warehouse, Processing and Distributive Workers Union, etc.* v. *The Buckeye Cotton Oil Company,* 236 F.2d 776 (CA-6, 1956). In all these cases (and there are others), either some or all of the questions here presented have been decided.

The district court relied upon district court cases in support of its conclusion that the Norris-LaGuardia Act was a bar to the allowance of the relief sought. Since its order of dismissal, however, a number of courts have held to the contrary, including courts of appeals in the cases above cited. In fact, the overwhelming weight of authority is to

the effect that the Norris-LaGuardia Act does not constitute a bar. We agree and hold accordingly.

Paragraph (a), Sec. 301, of the Labor Management Relations Act, 29 U.S.C.A. Sec. 185 (a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The question is whether Congress by this provision created a substantive right enforceable in a federal court. Some of the courts hold that it is merely jurisdictional or procedural, while others hold that in addition it creates a substantive right. A reading of the plain, unambiguous language, however, forces us to the view that no substantive right was created. The section provides nothing more than that suits for violation of certain specified contracts may be brought in a district court "without respect to the amount in controversy or without regard to the citizenship of the parties." In other words, a forum is created in the absence of diversity jurisdiction the same as though it existed. Paragraphs (b) and (c) of the same section support this view of the intendment of (a).

More important, however, is the decision of the Supreme Court in *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437. We shall not add to the flood of words which have been employed in appraising, dissecting and distinguishing that opinion, which has become almost as controversial as the provision under discussion. True, there was a sharp division among members of the court, which perhaps is responsible for the contrariety of views as to the holding. However, Mr. Jus-

tice Frankfurter, who announced the judgment of the court in an opinion joined in by Mr. Justice Burton and Mr. Justice Minton, relative to Sec. 301 stated (page 443):

> "If the section is given the meaning its language spontaneously yields, it would seem clear that all it does is to give procedural directions to the federal courts. 'When an unincorporated association that happens to be a labor union appears before you as a litigant in a case involving breach of a collective agreement,' Congress in effect told the district judges, 'treat it as though it were a natural or corporate legal person and do so regardless of the amount in controversy and do not require diversity of citizenship.' "

He also stated that when Sec. 301 was considered in the context of the Act as a whole, "the meaning which the section by itself affords is not affected." The legislative history of the provision as related by the court in Westinghouse strongly supports the premise that the sole purpose of Congress was to provide a forum, not to create substantive rights. The Fourth Circuit, in *Lincoln Mills of Alabama* v. *Textile Workers Union of America, CIO;* 230 F.2d 81, 87, relied upon the Westinghouse case in support of its holding that Sec. 301 is merely a jurisdictional provision. We agree not only with the result reached by the court in that case but also with its appraisement of the decision of the Supreme Court in Westinghouse.

This brings us to the much disputed question as to whether Congress has otherwise created a substantive right to enforce an arbitration clause contained in a collective bargaining agreement between a union and an employer whose employees the union represents. Such a right, if it exists, must be found in the Arbitration Act, Title 9 U.S.C.A. Sec. 1 *et seq.* Only Secs. 1 to 4, inclusive, need be mentioned in connection with the instant inquiry. Sec. 1 enumerates the two subjects encompassed by the Act, that

is, " 'Maritime transactions' " and " 'commerce' ", with the definition for each, together with "exceptions to operation of title." We are here concerned only with commerce and the exceptions. "Commerce" is given its traditional definition, that is, "commerce among the several States or with foreign nations * * *." The exceptions are: "* * * but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." A question arises, therefore, as to whether the collective bargaining agreement entered into between plaintiffs and defendant is a contract of employment "of workers engaged in foreign or interstate commerce." Section 2, so far as here material, provides, "* * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * shall be valid irrevocable and enforceable * * *." This section presents the question as to whether the bargaining agreement under discussion is a contract evidencing "a transaction involving commerce." Section 3 provides for a stay of proceedings in a suit where the issue therein is referable to arbitration. Section 4 provides: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

The Supreme Court in *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U.S. 198, 200-201, held that these sections "are integral parts of a whole," and that "Secs. 1 and 2 define the field in which Congress was legislating." The court also stated, "Section 2 makes 'valid, irrevocable, and enforceable' only two types of contracts:

those relating to a maritime transaction and those involving commerce." It appears clear, therefore, that the coverage of the Act, that is, the substantive right, if any, which was created, must be found in Secs. 1 and 2. Thus, plaintiffs' contention, if sound, requires a holding that the collective bargaining agreement was not a "contract of employment" and, therefore, not excepted under Sec. 1, but at the same time that it was "a contract evidencing a transaction involving commerce," under Sec. 2.

On the issue as to whether a collective bargaining agreement constitutes a "contract of employment" within the exception of Sec. 1, the courts again are sharply divided. Those holding in the negative place much reliance, mistakenly we think, upon a statement in *J. I. Case Co.* v. *National Labor Relations Board,* 321 U.S. 332, 334, as follows:

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment."

The court also stated on the following page:

> "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. * * * But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring."

In our judgment, this statement in Case affords no sup-

port for the contention that the collective bargaining agreement under the circumstances of the instant case should not be characterized as a contract of employment. As the court in Case recognized, "Contract in labor law is a term the implications of which must be determined from the connection in which it appears." The circumstances there were far different from those here. There, the court was considering an unfair labor practice charge based upon the employer's refusal to bargain with the union. It sought to justify its refusal on the ground that 75% of its employees were working under individual contracts of employment and that any agreement made with the union would affect the rights of such employees under such individual contracts. The court sustained the Labor Board, which had held against the employer. Obviously, the court was not concerned with a contract of employment, not even a trade agreement of which the court speaks. The sole issue was whether the employer was obligated by law to enter into bargaining negotiations with the union.

In contrast, we are here concerned with an arbitration provision contained in an agreement between the union and the employer which fixes and determines in great detail the rights and obligations of the parties, including the employees. As to the latter, it fixes their rates of pay, hours of work and many other details in connection with their employment, such as time and a half for Saturday work, double time for certain designated holidays, premium in the hourly rate of pay under specified conditions, rest periods, time off for lunch periods, seniority rights, sick and accident benefits, and vacation rights. Moreover, the rights and obligations of the employer, as well as the union, are spelled out in detail.

We assume that a mere bargaining agreement which the court was discussing in Case would not constitute a contract of employment, particularly in a situation where, as

in that case, the employees were under individual contracts. Even so, a collective bargaining agreement entered into by a union for the benefit of employees (present or future) is a prospective contract of employment which becomes absolute at the time of hiring. The hiring merges with and becomes a part of the contract of employment, the terms and conditions of which have been determined in advance. To hold that the bargaining agreement at that time does not constitute a contract of employment is to ignore realities. It would mean that there is no contract of employment between an employer and its employees, working under the terms and conditions set forth in a collective bargaining agreement. Such a contract could only exist in a case of individual hiring where the employer and the employee were free to fix the terms and conditions of employment.

As already pointed out, the coverage of the Act must be determined from Secs. 1 and 2, considered together. In order to escape the exception of Sec. 1, it is argued, as it necessarily must be, that the collective bargaining agreement is not a contract of employment, while at the same time, in order to come within the provisions of Sec. 2 it is argued, as it necessarily must be, that the collective bargaining agreement is a "contract evidencing a transaction involving commerce." Those two contentions are irreconcilable and, in our judgment, cannot stand side by side. More than that, even though we assume the soundness of plaintiffs' contention as to the exception contained in Sec. 1, we think Sec. 2 is without application. In the absence of a contract of employment, we are not able to discern how there could be a "contract evidencing a transaction involving commerce." A collective bargaining agreement, whether it be characterized as a contract of employment or otherwise, does not evidence a transaction. It evidences an agreement which determines the terms and conditions of employment and which in itself does not involve commerce.

It is only when the agreement becomes merged with the hiring of employees that commerce is involved.

For the reasons stated, the judgment must be affirmed. It is so ordered.

FINNEGAN, C. J. I concur in the result.

Office - Supreme Court, U.S.
FILED
APR 29 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 883

UNITED STEELWORKERS OF AMERICA,
Petitioner,

vs.

GALLAND-HENNING MANUFACTURING COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the application for a writ of certiorari to review the judgment of the United States Court of Appeals of the Seventh Circuit, entered in the above-entitled case on February 4, 1957, be denied.

QUESTIONS PRESENTED

1. Does Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, require a Federal District Court to specifically enforce the arbitration clause of a collective bargaining agreement?

2. Does the Federal Arbitration Act, 9 U.S.C. Sections 1-15, either of its own force or in conjunction with

Section 301 of the Labor Management Relations Act, require a Federal District Court to enforce the arbitration clause of a collective bargaining agreement?

STATUTES INVOLVED

Respondent adopts the statement of statutes involved found in Petitioner's brief, (p. 2), and Petitioner's Appendix A.

STATEMENT

Respondent adopts the Petitioner's statement of facts, except the reference found in Petitioner's brief, (p. 5), to the District Court's holding and Respondent desires to add the following, to-wit:

It is the position of the Respondent that the District Court, in granting the motion of the Defendant to dismiss the action of the Plaintiff-Petitioner, did more than merely hold that the Norris-LaGuardia "constitutes an insuperable bar to the granting of the relief sought." The District Court stated (R. 45):

> "It seems reasonably clear that the Federal Arbitration Act does not authorize the judicial enforcement of agreements to arbitrate labor disputes. *Lincoln Mills v. Textile Workers,* supra, and the authorities cited therein. Also see *Bernhardt v. Polygraphic Co. of America,* — U.S. —, 100 L. Ed. (Advance p. 203) (1955)."

The only other addition the Respondent wishes to add concerning the statement of the Petitioner concerns the last paragraph of Petitioner's statement in Petitioner's brief, (p. 5). It is true that the Circuit Court of Appeals made no reference to State law in its decision, but

Petitioner advanced no argument before the Circuit Court of Appeals that it was relying upon Wisconsin State law as its authority to obtain the relief prayed for. The Respondent, in its brief and argument before the Circuit Court of Appeals, advanced the theory that the policy of Wisconsin was that the Courts could not enforce executory agreements to arbitrate.

Local 1111 v. Allen-Bradley Co., 259 Wis. 609, 49 N.W. 2d 720 (1951).

ARGUMENT

I. The Public Policy in Wisconsin is That Executory Contracts to Arbitrate Are Not Enforceable by the Wisconsin Courts As Such.

The above stated question was considered in *Local 1111 v. Allen-Bradley Co.*, 259 Wis. 609, 49 N.W. 2d 720 (1951). It appears in that case that, one, Rose Giaimo was employed at the defendant Company and a member of the plaintiff Union, which was the bargaining agent for employees at the defendant Company. The collective bargaining agreement provided for the settling of grievances through arbitration. It appears that Rose Giaimo had taken a leave of absence and upon her application for reinstatement, was refused reemployment. After such refusal, the Union proceeded with a grievance hearing and ultimately asked for arbitration, with the Company refusing to proceed to such arbitration hearing. The plaintiff Union commenced an action in the Circuit Court of Milwaukee County, seeking an order to compel the employer to submit the dispute to arbitration. The Trial Court took the position that under the common law,

executory contracts to arbitrate are not enforceable and that Section 298.01 of the Wisconsin Statutes specifically states that arbitration clauses and contracts between employers and employees or employee associations are exempt under Section 298.01.

The Wisconsin Supreme Court, in affirming the lower Court, stated on Page 724:

> "The Reenactment of Sec. 298.01 in the same act which otherwise deals exclusively with matters affecting employer-employee relations is most significant. It is the expression of the Legislature that it intended to continue the rule that agreements for arbitration of labor disputes should not be enforceable. Whether or not we should agree with Judge Breidenbach that the common law requires us to hold an agreement for the arbitration of future disputes unenforceable, we may not overlook the positive declaration of Legislature that agreements made between employer and employee are not enforceable as are such contracts made by others."

The doctrine in *Local 1111 v. Allen-Bradley Co.*, 259 Wis. 609, 49 N.W. 2d 720 (1951), has not been changed or modified and is still the law in Wisconsin.

II. The Enforcement of Arbitration Agreements By the Wisconsin Labor Board Does Not Give the Wisconsin Courts as Such the Right to Enforce Arbitration Agreements.

The Petitioner is taking the limited facts and limited doctrine set forth in *Dunphy Boat Corp. v. Wisconsin Employment Relations Board*, 267 Wis. 316, 64 N.W. 2d 866, and generalizing that the Wisconsin Courts as

such have power to enforce arbitration agreements and, therefore, the Federal District Court should apply such doctrine in the case at bar. It would appear to the Respondent that the argument of the Petitioner lacks logic. The facts in the *Dunphy Boat Corp. v. Wisconsin Employment Relations Board* case, supra, reflect a situation where a Union had a dispute with an employer and the Union requested such dispute to proceed in arbitration. The Company refused to go to arbitration and the Union charged the Company with an unfair labor practice under Section 111.06(1)(f), Wis. Stats. The Wisconsin Board found the Company guilty of the unfair labor practice and issued the usual cease and desist orders. In conformity with the Wisconsin State Labor Act, the matter was appealed to the Circuit Court. The Circuit Court applied the doctrine of the *Allen-Bradley* case, supra, and dismissed the complaint of the Wisconsin Employment Relations Board.

On appeal to the Wisconsin Supreme Court, Justice Steinle specifically pointed out that the *Allen-Bradley* case, supra, and the *Dunphy Boat Corp.* case, supra, were entirely two different situations, and stated such position at Page 325, to-wit:

> "Our holding in the Allen-Bradley case was based upon the premise that Courts were powerless at common law to enforce an agreement to arbitrate a future dispute and, therefore, without Statutory authority conferring such power on the Courts, they could not grant specific performance of such a contract. Chapter 298 Stats. was the only statute which attempted to invest the Courts of this State with power to specifically enforce an agreement to arbitrate future disputes, but Section 298.01 Stats. there-

of specifically excluded labor contracts from the provisions of that chapter. * * *"

"There is nothing to prevent the Legislature from conferring power of a quasi-judicial nature upon administrative agencies, with which it does not invest the Courts. For example, our Trial Courts have no authority to grant workmen's compensation benefits to injured employees, in spite of the fact that such power has been granted to the industrial commission by Ch. 102 Stats."

In other words, from the *Dunphy Boat Corp.* case, supra, we have a situation where the Legislature of the State of Wisconsin has invested in an administrative agency, the Wisconsin Employment Relations Board, the power to enforce agreements to proceed to arbitration and we also find in that case the doctrine that unless the Statutes specifically give such power to the Courts, the Courts are powerless to enforce such executory agreements to arbitrate.

That is precisely the doctrine set forth in *Textile Workers v. Lincoln Mills,* 230 F. 2d 81, where the Circuit Court of Appeals for the Fifth Circuit in effect said that if there is no Statutory authority for the Courts of Alabama to enforce executory contracts to arbitrate, the Federal District Courts in that State are lacking in the power too, unless there is authority for such enforcement in the Federal law.

It is the position of the Respondent that this honorable Court, in *Association of Employees v. Westinghouse Corporation,* 348 U.S. 437 (1955), ruled in effect that Section 301 of the Taft-Hartley Act did not create any new substantive law concerning the enforcement of

executory contracts to arbitrate and in the absence of such activity by Congress, the Federal District Courts have no jurisdiction to enforce such executory agreements.

By the same token, for the Federal District Courts seated in Wisconsin to enforce executory contracts to arbitrate under Wisconsin doctrine, there must be Statutory authority to give the Courts, as such, such power to perform such act. The Wisconsin Legislature has prohibited the enforcement of agreements to arbitrate in labor contracts by virtue of Section 298.01 Wis. Stats., which specifically exempts such contracts from the application of the Statute. Further, it is even more specifically set forth in the *Dunphy Boat Corp.* case, supra, in the language of Justice Steinle that the Legislature only gave the power to force people to go to arbitration to the administrative agencies in the State of Wisconsin and not to the Courts. It is not purely a question of procedure, as the Petitioner intimated in his brief, but it is a question of taking the matter to the proper tribunal. Simply because an administrative agency in the State of Wisconsin has the authority to do an act, that would not be the basis and authority to provide the Federal District Courts with the same power.

CONCLUSION

The decision of the Circuit Court of Appeals for the Seventh Circuit correctly decided the issue in the above-entitled case, in that Section 301(A) of the Taft-Hartley Law did not give the Federal District Courts authority to enforce executory contracts to arbitrate and that the United States Arbitration Act did not give the Federal District Courts any authority to enforce such executory

contracts to arbitrate. Further, there is no Statutory authority in the State of Wisconsin to permit the Wisconsin Courts, as such, to enforce executory agreements to arbitrate and, therefore, the Federal District Courts do not acquire any such authority through the Wisconsin Courts.

Respectfully submitted,

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